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No. 97-1608

In the
Supreme Court of the United States
October Term, 1997

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do federal courts have jurisdiction to determine the scope of state authority to tax on-reservation gaming activities at tribal facilities conducted pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et. seq.*?

2. Should this Court hear and decide a Tenth Amendment claim that was not timely presented to, or decided by, the court of appeals?

3. Was the court of appeals correct in holding that 25 U.S.C. §2710(d)(7)(A)(ii) includes no implied right of action permitting states to initiate enforcement actions against allegedly unlawful tribal gaming activities that are not the subject of a tribal-state compact?

PARTIES TO THE PROCEEDING

The Petition to which this Brief in Opposition is addressed (Case No. 97-1608) lists Southern California Off-Track Wagering, Inc. (SCOTWINC) and six racing associations—Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and Los Angeles County Fair—as respondents, either in the caption or in the "Listing of Parties to the Proceedings," at page ii.

This Brief in Opposition is filed on behalf of the Cabazon, Sycuan. Barona and Viejas Bands of Mission Indians, the appellants below and the respondents in this Court. These four respondents do not believe that SCOTWINC and the six racing associations are respondents in this proceeding. SCOTWINC and the six racing associations were unsuccessful intervenors below and are, in fact, petitioners before this Court in case No. 97-1636.

The parties to Case No. 97-1608 are as follows:

Petitioners:

Pete Wilson, Governor of the State of California
State of California
California Horse Racing Board

Respondents:

Cabazon Band of Mission Indians
Sycuan Band of Mission Indians
Barona Band of Mission Indians
Viejas Band of Mission Indians.

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STATEMENT OF THE CASE

The central issue in this case is whether the State of California will be required to live up to the agreements that it negotiated with the respondent Indian tribes nearly eight years ago. Simply put, the State[1] agreed in gaming compacts with the Tribes to turn over license fees it collected from wagers placed at the Tribes' off-track betting facilities if the fees were held to be impermissible by a federal court. The Ninth Circuit Court of Appeals has now held twice that, under well-established principles of federal Indian law, the fees are impermissible.[2] The State's current petition for writ of certiorari is therefore nothing more than a last ditch effort to avoid complying with the deal that it struck with the Tribes in 1990.

This case does not involve issues that warrant review by this Court. The State of California has refused to negotiate or execute any other compacts authorizing off-track wagering, so no future compact will ever resemble the four compacts at issue in this case. As a result, no other federal court is likely to be faced with the issues addressed in this case and, while the underlying issues in dispute involve federal questions, these federal questions have been resolved by the court of appeals in accordance with well established principles of federal Indian law as handed down by this Court.

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[1] As used herein, "State" refers to the State of California, Governor Wilson and the California Horse Racing Board, the defendants in the district court action and petitioners here.

[2] The State did not seek this Court's review of the Ninth Circuit's first decision, which is reported at 37 F.3d 430 (9th Cir. 1994) and which is referred to by that Court, and by the State in its petition, as "Cabazon II." "Cabazon I" is the original district court decision that was reversed by the Ninth Circuit in 1994, and which is reported at 788 F.Supp. 1513 (E.D. Cal.1992).

In an attempt to convince the Court otherwise, the State has overlaid layers of needless complexity onto a relatively straightforward Indian tax controversy. The State has clouded issues and re-invented the history of this case, hoping that this Court will reconsider the most recent court of appeals' decision that held the State to its word. The State seeks to avoid having to pay the Tribes money to which the Tribes are legally entitled under clear and unambiguous agreements and is asking this Court to re-write well established principles of federal Indian law in order to relieve the State of its obligation to the Tribes.

Although this case may have originated as a dispute about the respective taxing authority of the Tribes and the State, and no matter how the State may attempt to characterize it otherwise, at this point this appeal is about nothing more than money. More precisely, this appeal is about whether the State will be able to retain a large fund of money that has accumulated while the State and four federally-recognized Indian tribes have litigated their respective entitlements to those funds.[3] Despite the State's desperate attempt to shift the focus, the essential nature of this case at this point is the disposition of this fund, to which the court of appeals has already twice held the Tribes are entitled.

The genesis of the present controversy stems from the inability in 1990 of the original plaintiff tribes to reach agreement with the State on a jurisdictional issue

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[3] The four tribes are the Cabazon and Sycuan Bands of Mission Indians, who filed the original action in 1990 (hereinafter referred to as the "original plaintiff tribes," and the Barona and Viejas Bands of Mission Indians who intervened in mid-1996, making claims identical to those of the original plaintiff tribes. Together, the four tribes will be referred to herein as the "Tribes."

in the course of negotiating compacts with the State under which those tribes would conduct off-track wagering on horse races, also known as simulcast wagering.[4]

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, et seq., (hereinafter, "IGRA") authorizes tribes and states to negotiate and enter into such compacts on the subject of how such a tribe in such a state may engage in forms of class III gaming on its Indian lands.[5] The compacting process under IGRA is a unique arrangement devised by Congress for multiple purposes, one of which is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2701(1). However, under IGRA, one principle is clear: a state may not attempt to tax or otherwise profit from tribal governmental gaming under such a compact, beyond being reimbursed for its actual and reasonable costs of regulation. *See* 25 U.S.C. § 2710(d)(4). Even a request for such state taxation is *per se* an act of bad faith bargaining. 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

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[4] California allows live on-site wagering on horse races both at race tracks where the race is being run, and off-track wagering at other locations which are linked to the live race by the instantaneous electronic transmission of the audio and visual race signals from the live track to these remote "satellite" locations. The arrangement is known as "simulcast" racing and wagering at remote "simulcast" facilities. Wagers placed at both the live location and these simulcast facilities are placed into a single parimutuel pool, and winners are paid at all locations from this pool.

[5] Congress enacted IGRA at least in partial response to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that the State could not prohibit or regulate the Cabazon Band's on-reservation gaming activities.

When the original plaintiff tribes were negotiating with the State on the subject of tribal operation of simulcast wagering facilities on their reservations, as described above, agreement was reached on all points but one. In general, the State and the original plaintiff tribes agreed to adopt the same state statutory scheme for allocating and distributing the total amount wagered (known as the "handle") as applied to non-tribal simulcast facilities. This statutory scheme allocates 83% of the handle back to winning bettors and smaller, stated percentages[6] of the remainder (known as the "takeout") to a variety of participants in the racing industry, including local governments, pension funds, purses, commissions, breeder and stallion awards, equine research, satellite wagering facilities and, finally, to the State as a "license fee."[7]

The one point on which the State and those two tribes could not agree was whether the State's collection of the license fee on wagers placed at tribal simulcast facilities was permissible under IGRA. That fee varies from 1.5%-4% of the handle, depending on the breed of the horse, the type and location of a particular race and other factors. *See* B&P Code §§ 19611-19612.6.

Rather than allow an impasse on this issue to obstruct the compact negotiation process, the original plaintiff tribes and the State agreed in their respective compacts that the question would be resolved through federal court litigation, to which the State expressly consented. Paragraph 19 of each compact provided that, if the final judgment in the agreed-upon litigation held

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[6] See California Business & Professions Code (hereinafter "B&P Code") §§ 19605.7, *et seq.*, for the entire complex allocation scheme.

[7] Although designated as a license fee, all parties to this case agree that this "fee" is a tax.

that the fee was permissible under federal law, the State would retain the funds and would be permitted to continue collecting them without additional reimbursement for regulatory expenses. On the other hand, the compact was equally clear that if the state license fee was determined to be impermissible in such a final judgment, the State would pay the accumulated disputed funds from its treasury over to the tribes for the period up to entry of final judgment (less reimbursement for the State's actual regulatory costs), and thereafter the disputed funds would be distributed directly to the tribes for the duration of the compacts. [8]

The actual language of paragraph 19 of the Cabazon Band's compact is reproduced in full in the Appendix to this brief.[9] The relevant language, however, is found in paragraph 19(B)3, which provides in pertinent part:

> In the event a final judgment is obtained that the deduction and distribution of the state license fee is impermissible under the Act, and following the exhaustion of all appellate review, ***the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State***

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[8] The record in this case demonstrates that the State's actual regulatory expenses are miniscule. During the first year of operation of the Cabazon facility and the first six months of operation of the Sycuan facility, the State incurred total regulatory costs for both tribal facilities of less than $23,000. During the same period, the State collected approximately $740,000 in license fees on wagers placed at those two facilities. *Cabazon Band of Mission Indians v. Wilson,* 788 F.Supp. 1513, 1515-16 (E.D.Cal.1992)

[9] Identical or equivalent language appears on the compacts of each of the four respondent tribes.

> ***under this compact*** exclusive of assessments due and owing under subparagraph 4, below, ***and Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon simulcast wagering facility.***

(Emphasis added)

This negotiated compact language is simple and clear. Depending on the final outcome of the agreed-upon litigation, either the State would keep the disputed funds itself, or it would pay to the Tribes both the money that had accumulated prior to final judgment, and the money that thereafter otherwise would be deducted and distributed to the State as long as the compacts remained in effect.

In October of 1994, the Ninth Circuit Court of Appeals ruled in favor of the original plaintiff tribes, holding that the State's collection of the license fee from on-reservation wagers was preempted by IGRA, that the tribes were entitled to the license fees and remanding the case to the district court with instructions to enter summary judgment for the Tribes.[10] Certiorari was not sought, so the Ninth Circuit's decision became final in January of 1995. The Tribes have been trying to enforce that judgment and collect their money ever since.

The amount at stake is large and growing larger by the day. The accumulated state license fees for all four respondent Tribes was approximately $14 million as of January 15, 1998, and the State is collecting additional

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[10] *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994).

license fees during the pendency of this appeal. Because of the State's intransigence and delaying tactics, the Tribes have been and continue to be deprived of funds with which they would provide the governmental services and programs that IGRA directs shall be funded with tribal gaming revenues.[11]

When the State did not seek review by this Court of the 1994 ruling, the case was remanded to the district court for what the Tribes anticipated would be a routine entry of judgment in their favor. But that is not what happened. Instead, by letter dated May 31, 1995, the State informed the respondent Tribes that the Ninth Circuit's 1994 decision rendered their four compacts *invalid*, and that therefore the State would discontinue the simulcast signal as of July 1, 1995. To prevent the loss of the simulcast signal (without which no simulcast facility can operate), the original plaintiffs, the Cabazon and Sycuan Bands, filed motions for a temporary restraining order, and the Barona and Viejas Bands of Mission Indians filed complaints in intervention and similar motions. By its Order of June 30, 1995, the district court granted intervention and the temporary restraining order. However, on July 12, 1995 the district court issued a further order directing not the entry of judgment in favor of the Tribes as the Court of Appeals had directed, but rather requiring that the Tribes file amended complaints and complaints in intervention seeking recovery of the disputed funds. In doing so, the district court rejected the motion of the Tribes for further

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[11] IGRA requires that a tribe devote its net gaming revenues only "(i) to fund tribal governmental operations or programs, (ii) to promote the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; and (v) to help fund operations of local governmental agencies. 25 U.S.C. § 2710(b)(2)(B).

relief under 28 U.S.C. § 2202, namely, the entry of judgment in favor of the tribes for the payment of the accrued and future state license fees, as directed by the court of appeals. In its order, the district court acknowledged that the State would then be able to assert various defenses to the Tribes' amended complaints and complaints in intervention, and to assert counterclaims against the Tribes.

The Tribes objected to having effectively to start their litigation over by filing amended complaints and complaints in intervention, and instead argued that all that was needed after the Ninth Circuit's explicit remand order was entry of judgment by way of their motion for further relief under 28 U.S.C. § 2202. However, the district court disagreed.

To test whether such a new phase of the litigation was proper, the Tribes filed a petition for a writ of mandamus with the court of appeals, requesting that the district court be directed to follow the court of appeals' remand order, rather than requiring the Tribes to file amended complaints and complaints in intervention aimed at recovering the disputed funds. By Order of December 8, 1995, the court of appeals denied the petition for a writ of mandamus, holding that, because relief by appeal was available, use of the extraordinary writ was unnecessary.

Having no other choice, the four Tribes filed their amended complaints and complaints in intervention, seeking the same disputed state license fees as had been the original object of this case in 1990. The State filed its answers, asserting several affirmative defenses and counterclaims. The Tribes moved to strike the affirmative defenses and to dismiss the counterclaims. The district court granted these motions in full by its

Memorandum of Opinion and Order of April 26, 1996, which also directed the State to "report to the Court within 14 days as to how it will comply with the compacts in light of the ruling by the Court of Appeals." The State never submitted such a report; instead it filed a motion for reconsideration.[12] By its Memorandum of Decision and Order of July 19, 1996, the district court denied the State's motion for reconsideration and directed that "within 14 days of this order the State shall pay over to the tribes the monies that have been assessed as a license fee on pari-mutuel off-track wagering at the plaintiffs' simulcast facilities. . . . The court will not stay this order."[13]

The State appealed from the district court's judgment and, in *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (1997), the court of appeals rejected each of the State's arguments, finding them to be inconsistent with, or foreclosed by its earlier 1994 *Cabazon II* decision.[14] First, the court of appeals held

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[12] Shortly before the hearing on this motion, the various racing associations and SCOTWINC (the simulcast organization) petitioned for leave to intervene, claiming that if the State could not collect the disputed license fees, the accumulated funds should go to them. That petition was denied by the district court as untimely, the Ninth Circuit affirmed, and the would-be intervenors have now filed a separate petition for certiorari in this Court. *See* No. 97-1636.

[13] The parties subsequently agreed that while the State would not be required to pay the disputed funds over to the Tribes until all appeals were exhausted, the State would deposit the monies into a special segregated state fund, where they are today.

[14] Under the Ninth Circuit's "law of the case" doctrine, one panel of the court will not as a general rule reconsider questions that another panel has previously decided in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996); *Kimball v. Callahan*, 590 F.2d 268 (9th Cir. 1974). Therefore, the panel was clearly correct in its most recent decision in noting that "[o]ur decision in

that the State expressly consented to suit in federal court in the compacts and, thus, waived its Eleventh Amendment immunity. 124 F.3d at 1057.

Second, the court of appeals held that the State could not properly introduce extrinsic evidence in support of an interpretation of the compact that is "contrary to its plain and unambiguous language." *Id.* at 1057. The Court reasoned that extrinsic evidence offered by the State was merely an attempt to "escape the natural consequences of [its] Cabazon II decision." *Id.* In the words of the court of appeals, "[w]e will not entertain strained interpretations of a clear and unambiguous compact provision. Instead, we hold the State to its word." *Id.* at 1058.

Third, the court of appeals held that the State misconstrued its analysis in its 1994 *Cabazon II* decision regarding the primary beneficiaries of gaming revenue. As discussed below, that federal policy seeks to ensure that tribes, rather than States, should be the primary beneficiaries of tribal gaming operations. This policy was threatened by the State's imposition of the tax at issue, but it was in no way threatened by the fact that the Tribes had agreed in their compacts to adopt the other parts of the State's standard wager distribution system. *Id.* at 1058-59.[15]

Finally, the court of appeals rejected the State's argument that the compacts were unenforceable because the tribes were purportedly conducting unlawful gaming

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Cabazon II is central to the resolution of the instant dispute, and it limits the task before us." 124 F.3d at 1054.

[15] The fees paid to others under that system compensate the participants for services that are directly or indirectly rendered to the racing industry as a whole, and thus benefit the Tribes as well.

activities not authorized by the compacts. The plain language of IGRA foreclosed any such contention. As the court of appeals noted, "[o]utside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government." *Id.*

This case was never intended to be, and in reality is not, terribly complicated. If the issues have become somewhat obscure, that is caused by the dust cloud thrown up by the State as it thrashes about seeking to avoid living up to its negotiated agreements with the Tribes. For the reasons set forth below, the Court should deny the petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

A. Federal Courts Have Jurisdiction Under 28 U.S.C. §1362 To Determine The Scope of State Authority To Tax On-Reservation Activities.

The petitioners' assertion that the courts below did not have jurisdiction over this case does not warrant review by this Court. The lower courts correctly applied settled law in determining that they had federal question jurisdiction to grant the relief requested.

The State concedes that the district court initially exercised proper jurisdiction over this case, yet contends that the district court somehow lost such jurisdiction after the court of appeals made its initial ruling in favor of the Tribes in October, 1994. In the 1994 decision, the court of appeals held that the original plaintiff tribes were entitled to the license fees at issue and remanded the case to the district court with instructions to enter summary judgment for the Tribes. At that point, the State claims that the district court's jurisdiction disappeared because

this case became a purely contractual arrangement that "happen[s] to be incorporated into tribal-state compacts." *State's Petition* at 13. This argument is without merit.

This case remains what it has always been: a dispute about whether the State can lawfully impose its license fees on wagers placed at the Tribes' off-track wagering facilities under federal law. While the compacts negotiated by the State and the Tribes certainly are binding agreements, this case is no "run-of-the-mill contract" enforcement case. 124 F.3d at 1055. The court of appeals rejected the State's argument to that effect, recognizing that "this claim is not based on a contract that stands independent of the Compacts." *Id.* The compacts were made pursuant to federal law, and were approved by the Secretary of the Interior, as required under IGRA. 25 U.S.C. §2710(d)(3)(B). The dispute over state taxing authority at the heart of this case is a dispute that arose under the provisions of IGRA and is therefore grounded on principles of federal Indian law.

The State contends that the central question in this case somehow changed when the State unilaterally declared the compacts to be invalid following the 1994 court of appeals decision. Such an argument flies in the face of reason, as well as the factual record. The issues involved in this case could not change simply through a unilateral declaration by the State that the *Cabazon II* decision in favor of the Tribes somehow invalidated the Tribal-State compacts; a position that the district court immediately rejected. The State's argument on this point, as well as its tactics throughout this case, amount to nothing more than a smoke-screen thrown up in an attempt to cloud the issues and allow the State to avoid complying with the agreement it struck with the Tribes.

The court of appeals found two alternative grounds on which it could exercise federal question jurisdiction over this case. First, the court found that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id.* at 1056. This case involves important federal interests codified in IGRA – interests that in and of themselves give rise to federal question jurisdiction. *See Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 814 n. 12 (1986); *see also Forest County Potawatomi Tribe v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (tribal suit to enforce rights under IGRA agreement involved federal question). Under IGRA, Congress gave Tribes the right to conduct Class III gaming pursuant to negotiated compacts, and outlined the rights Tribes and States could have under those agreements. This case has established and enforced these federal rights and, as this Court has stated, "the federal nature of the right to be established is decisive" of whether the action arises under federal law. *Gully v. First National Bank*, 99 U.S. 109, 116 (1936). Under this test, the present action clearly arises under federal law.

Second, the court of appeals also found that "[t]he Bands' cause of action arises under the laws of the United States" because "[t]he Bands sue to recover money taken by the State in violation of federal law." 124 F.3d at 1056. This statement of law is in perfect harmony with this Court's prior Indian tax case decisions.

This case is indistinguishable from a long line of federal cases that have determined the scope of state authority to tax on-reservation activities. In 1976, this Court carefully considered whether federal courts have jurisdiction over suits to restrain state taxing authority

asserted against Indian tribes and found that such jurisdiction is based on 28 U.S.C. §1362, which provides "that district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473-74 (1976). This Court has also clearly held that "a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under §1362..." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 762 n.2 (1985), and has repeatedly recognized federal question jurisdiction over disputes regarding the scope of state taxing authority over on-reservation activities. *See e.g., Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Here, as the court of appeals recognized, federal jurisdiction arises because four Indian tribes seek to enjoin the State from imposing a tax that is pre-empted by federal law. Questions surrounding the scope of state authority to tax on-reservation activities are federal questions. In particular, this Court has recognized that the doctrine of federal preemption, as employed by the Ninth Circuit in this case, is the analytical tool by which such questions are resolved. "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan v. Arizona State Tax*

Commission, 411 U.S. 164, 172 (1973). *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Department of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc.*, ___ U.S. ___, 114 S.Ct. 2028, 2035 (1994). Thus, the district court clearly had jurisdiction over this case, and the State's suggestion to the contrary runs counter to the most basic principles of federal Indian law announced by this Court.

In addition, there is a third basis for sustaining jurisdiction in this case. All parties, including the State, agree that the district court had jurisdiction to adjudicate the Tribes' original action for declaratory judgment. That being the case, the court necessarily had jurisdiction under 28 U.S. C. §2202 to enter such further orders as were necessary to give complete and effective relief consistent with its declaratory judgment. *Powell v. McCormack*, 395 U.S. 486, 498 (1969). Although the district court allowed the case on remand to become more complex than necessary, the order eventually entered by the district court could and should have been entered in response to the Tribes' motion for further relief under 28 U.S.C. §2202, a motion over which the court plainly had jurisdiction and under which it did grant the Tribes some limited relief.[16] Because this Court can affirm on any ground presented, whether or not relied upon by the lower courts, *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), this Court should deny the writ on the basis that the lower courts properly exercised jurisdiction over this case. The State presents no substantial federal question regarding either the merits of the federal

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[16] In its Memorandum of Opinion and Order of July 12, 1995, the district court held that under §2202 it could enjoin the State from unilaterally declaring the compacts invalid and cutting off the satellite signal to the Tribe's gaming facilities. *See* Appendix to Petition at App. 6, App. 18-21.

preemption of the state tax at issue in this case, or of the jurisdiction of the federal courts to determine that issue.

B. **The State Clearly Consented To Suit In Federal Court.**

The State next seeks to invoke an Eleventh Amendment defense that plainly contradicts its own clear, unambiguous, express consent to suit in federal court. This attempt to rewrite the factual history of the case does not warrant review by this Court.

The State claims in its petition that it consented to this action in federal court up until the court of appeals made its initial ruling in favor of the Tribes in October 1994. At that point, the State claims that it no longer consented to suit. *State's Petition* at 14. Put another way, the State's position is that it consented to suit only so long as the court might find in its favor. This puzzling claim is at odds with the undisputed facts of this case.

As the court of appeals explained:

> [i]n Paragraph 19, the State expressly agreed that the Bands 'shall seek a declaratory judgment against the State from a United States district court of competent jurisdiction as to whether the deduction and distribution of the state license fee . . . are permissible under the Act.' *Moreover, in paragraph 19, the State not only consented to the suit, but it also agreed to the remedy.*

124 F.3d at 1057. (Emphasis added). Paragraph 19(b) of the Compacts, in which the State expressly agreed to turn over the monies in the event the Tribes won the litigation, clearly

demonstrates that the court of appeals was correct in this conclusion.

Further, the court of appeals found that the State's waiver of immunity to suit in federal court extends to all actions under the Compact, pursuant to Paragraph 18 of the Compact. *Id.* at 1057.

Thus, the State expressly waived its immunity under paragraph 19 with regard to the complete adjudication of the license fee dispute and further waived its immunity under the more general provisions of the Compact regarding judicial review. As a result, there is no merit to the State's makeweight Eleventh Amendment claim, and the court of appeals properly rejected it.

C. The State Has Significantly Misrepresented The Lower Courts Decisions Regarding IGRA's "Primary Beneficiary" Policy and Suggested To This Court A Conflict That Does Not Exist.

The State next alleges that the lower courts "cannot come to a consistent position respecting the application of IGRA's 'primary beneficiary' policy to the facts of this case." *State's Petition* at 16. The claim that there is a conflict rests solely on the state's misunderstanding of the lower courts' decisions in this case.

According to the State, the Compacts are purportedly invalid because the Tribes receive a fraction of the total wagering revenue while other participants in the racing industry collectively receive a larger percentage of the total amount wagered. Contrary to the State's argument, however, the wager distribution system had nothing to do with the question of whether the State

can lawfully impose its license fees on reservation gaming activities. As the court of appeals explained, the State misconstrued the analysis in its *Cabazon II* decision regarding the primary beneficiaries of gaming revenue. 124 F.3d at 1058.

The court of appeals in *Cabazon II* did not announce a new test that bars any tribal-state compact under which any entity receives more revenue from gaming than is received by the Tribes. Rather, the court of appeals considered the federal interest in ensuring that tribes are primary beneficiaries of Indian gaming only as one part of a larger balancing test, pursuant to well-established federal Indian law, and concluded on that basis that the license fees are impermissible. *Id.* At 1058.

There is no support in law or logic for the State's contention that the compacts are invalid merely because the Tribes agreed to incorporate into the compacts much of the State's standard wager distribution system. The wager distribution system had nothing to do with the central issue of whether the State can lawfully impose its license fees on reservation gaming activities.

The State goes to great lengths in its petition to suggest that the court of appeals most recent decision "effectively nullifies the holding of Cabazon II." *State's Petition* at 17. As the court of appeals explained, however, the State fundamentally misunderstands the Cabazon II holding regarding the federal interest in ensuring that tribes are the primary beneficiaries of gaming operations. 124 F.3d at 1058-59. As the court of appeals clearly determined, this policy is threatened by the State's imposition of the tax at issue, not by the fact that the Tribes have generally agreed to comply with other portions of the State's standard wager distribution system.

Here again, the State has tried to create a nonexistent issue in order to convince this Court that something in this case merits review. There is no split of authorities regarding this purported issue, and the Ninth Circuit's decisions in *Cabazon II* and *Cabazon III* are entirely consistent. The court of appeals properly considered the federal primary beneficiary policy as articulated in IGRA in accordance with well established principles of federal Indian law. Thus, this issue, like the others discussed above, does not merit review by this Court.

D. **The State's Tenth Amendment Claim Was Not Raised or Decided In The Court Below.**

The State further contends that the court of appeals decision has the effect of "diverting state tax revenues to the Tribes" in violation of the Tenth Amendment. *State's Petition* at 20. This claim is both incorrect and not properly presented here.

The State's Tenth Amendment claim is not properly at issue in this case. It has been long established that this Court reviews only those questions that were properly raised by the parties in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). The Court follows this rule because "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Further, "allowing the able counsel who argue before [this Court] to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646

(1992). *See also, Duignan v. United States*, 274 U.S. 195, 200 (1927); *Lawn v. United States*, 355 U.S. 339, 361 (1958).

The State did not raise the purported Tenth Amendment issue in either its opening brief or reply brief to the court of appeals. Accordingly, the court of appeals did not rule on the issue. The issue was raised for the first time in the State's petition to the court of appeals for rehearing, which was denied. Because it was not timely raised or decided by the courts below, this Court should not now entertain the purported Tenth Amendment issue.

Even if this argument were properly before the Court, however, the State's position is clearly erroneous. The State is not being required to "tax the racing industry for the benefit of the Respondent Tribes," as the State contends. *State's Petition* at 20. Rather, the Tribes merely seek that the State be precluded from collecting license fees from on-reservation wagers in violation of IGRA and well established principles of federal Indian law, and that the State further be required to live up to the explicit bargain that it presumably negotiated with the Tribes in good faith in 1990.

The State's power to tax the racing industry will be unimpeded by the decision handed down by the lower courts in this case. California tax statutes and collections will operate exactly the same after the Ninth Circuit's order is enforced. No other racing industry participant will be affected, because under paragraph 19(A) of the compacts, the State and the Tribes so agreed. The only difference will be that the amount of the state license fee from on-reservation wagers will be paid over to the Tribes, just as the State expressly agreed under Paragraph 19 (B) 3 of the compacts. The balance of the takeout will still be distributed as provided under

the State's statutory scheme.

As is readily apparent, this case is unrelated to recent Tenth Amendment cases upon which the State seeks to rely. In those cases, the federal government violated the Tenth Amendment by compelling States to dispose of radioactive waste, *New York v. United States*, 505 U.S. 144, 149 (1992), and by commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers, *Printz v. United States*, ____ U.S. _____, 117 S.Ct. 2365 (1997). In this case, by contrast, the United States does not commandeer any state agency to perform a federal regulatory function. Instead, the Tribes seek nothing more from the State than its compliance with the negotiated agreement that it signed with each of the Tribes. Thus, the Tenth Amendment is simply not implicated in this case.

E. The State's "Implied Covenant" Argument Was Properly Rejected By The Court of Appeals.

The State has seriously misrepresented the court of appeals' decision on this issue. The State claims that the court of appeals held that "Indian tribes have no obligation to comply with IGRA's prohibition against uncompacted class III gaming. . . unless they expressly agree to do so." *State's Petition* at 20-21. The court of appeals made no such holding. Rather, it correctly held that the enforcement of IGRA beyond the scope of negotiated Tribal-State Compacts is the exclusive province of the federal government, citing *Sycuan Band of Mission Indians v. Roache*, 54 F.3d. 535, 538 (9th Cir. 1995). As IGRA makes clear, and as *Sycuan* reaffirmed, the State has no jurisdiction over tribal gaming activities that are not included in a tribal-state compact; these

activities are subject to exclusive federal enforcement efforts.

Both the court of appeals and the district court found that the State's "implied covenant" argument was foreclosed by the plain statutory language of IGRA. 25 U.S.C. §2710(d)(7)(A)(ii) authorizes a state to seek an injunction in federal court, but only if the tribal gaming activities sought to be enjoined are "conducted in violation of any Tribal-State compact." Where, as here, the alleged tribal activities are not the subject of a compact, Congress intended that any enforcement efforts would be solely within the jurisdiction of the federal government, and the states would have no "implied" enforcement authority under IGRA under those circumstances.

The court of appeals unmasked the State's argument about a purported "implied covenant" and found it to be just another attempt by the State to co-opt federal power by asserting jurisdiction over gaming activities that are not the subject of a Tribal-State compact. 124 F.3d at 1059-60. The court of appeals settled this issue in accordance with the plain language of IGRA. Thus, this issue does not warrant review by this Court.

CONCLUSION

For all the reasons set forth above, the petition should be denied.

Respectfully submitted,

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APPENDIX

Paragraph 19, Cabazon Compact

19. Distribution of Handle

(A) Generally. Subject to subsections (B) and (C) below, the amounts deducted from parimutuel wagers at the Cabazon simulcast wagering facility, and the distribution of such amounts, shall be the same as that provided for under state law for simulcast wagering facilities, other than fairs, in the southern zone.

(B) State License Fee.

1. Cabazon shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee under Business and Professions Code Section 19596.6, subdivisions (d)(1), (d)(2), (k), and (l), are permissible under the Act.

2. In the event a final judgment is obtained that the deduction and distribution of the state license fee is permissible under the Act, and following the exhaustion of all appellate review, the State shall retain all license fees previously distributed to it, and shall be entitled to collect the state license fee from all wagers at the Cabazon simulcast wagering facility. Under such circumstances, the State shall not be entitled to any further assessment against or payment from Cabazon to cover the costs of State regulation of the Cabazon simulcast wagering facility, and the Cabazon simulcast wagering facility shall be entitled to all benefits and to participate in all programs under

applicable state law which are available to any simulcast wagering facility, other than a fair, in the southern zone.

3. In the event a final judgment is obtained that the deduction and distribution of the state license fee is impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State under this Compact exclusive of assessments due and owing under subparagraph 4, below, and Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon simulcast wagering facility. The amount of state license fee previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility shall be paid over to Cabazon as soon as practicable and in any event, not later than sixty (60) days following final judgment.

4. If it is judicially determined that the State is not entitled to receive the state license fee, the parties, in accordance with paragraph 11(B), shall modify this Compact to provide for assessment by the State of the actual costs incurred by it in regulating the Cabazon simulcast wagering facility and for the settlement and collection of such costs due and owing from the commencement of operation of the facility.

(C) Additional Provisions.

1. Cabazon and the simulcast organization may agree between them and incorporate into the agreement described in Paragraph 8, above, how the one percent (1%) of the handle designated for promotion of the program at the Cabazon simulcast wagering facility shall be distributed and expended; and

2. Cabazon shall be deemed to be the equivalent of the city or county entitled to the 0.33% of the handle distributed to the local government within which the simulcast wagering facility is located, and Cabazon shall receive such distribution.